

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL 77-6190

United States Court of Appeals
FOR THE SECOND CIRCUIT

IN THE MATTER OF THE

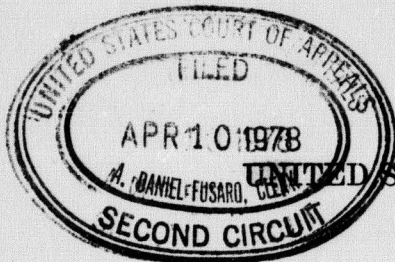
Complaint Tug OCEAN PRINCE, INC., and RED STAR
TOWING & TRANSPORTATION CO., as Owner and
Charterer of the Tug "OCEAN PRINCE" for Exoneration
from or Limitation of Liability,

*Plaintiffs & Third-Party Plaintiffs,
Appellees and Cross-Appellants,*

vs.

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.



On Appeal from the United States District Court for the
Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT
PITTSTON MARINE TRANSPORT CORPORATION

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED ON THIS APPEAL	1
POINT I—The grounding of the barge New London occurred as a result of fault within the privity and knowledge of Tug Ocean Prince Inc. and Red Star Towing & Transportation Co.	2
POINT II—Reimer's lack of familiarity with the Hudson River contributed to the grounding	8

Cases Cited

Helen B. Moran, Inc., The Complaint of Tug, 560 F2d 527	7
Lady Pike, 88 U.S. 1, 22 L.Ed. 499	9
Temple Bar, The, 137 F2d 293 (4 Cir.)	9

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Question Presented on this Appeal

This court must decide whether the grounding of the barge NEW LONDON at Con Hook Island on February 3, 1974 occurred without the privity and knowledge of the plaintiff appellees Tug Ocean Prince Inc. and Red Star Towing & Transportation Co.

POINT I

The grounding of the barge New London occurred as a result of fault within the privity and knowledge of Tug Ocean Prince Inc. and Red Star Towing & Transportation Co.

In Point I of its answering brief Tug Ocean Prince Inc. and Red Star Towing & Transportation Co. (hereinafter Red Star) following the lower court's opinion argue that the grounding of the barge NEW LONDON which occurred on February 3, 1974 resulted from an error of navigation and management aboard the tug OCEAN PRINCE and, therefore, not within their privity and knowledge.

To support this contention Red Star attempts to demonstrate the procedures followed in assigning the pilothouse personnel to the tug OCEAN PRINCE. They allege that the company had a practice wherein they would make certain that at least one of the men assigned to the tug had experience in local waters. They admittedly made no attempt to advise the pilothouse personnel of the respective experience of the two men assigned to the tug but rather relied on the men discussing their experience between themselves.

Red Star produced Mr. Phillip Keenan as a witness. He was their night dispatcher on the evening of February 2, 1974. Mr. Keenan dispatched the tug OCEAN PRINCE to perform the towing services requested by the operators of the barge NEW LONDON. He was asked on cross-examination whether he advised the pilothouse personnel at the time the tug was dispatched of their respective experience. He responded in the negative to this question. In answering other questions he stated that he had no instructions from the "office" to advise the pilothouse personnel with respect to their experience or lack of ex-

perience and that they assumed that the men would talk to each other.

Kiernan the pilot temporarily assigned to the OCEAN PRINCE was asked the following questions:

"Q. Captain, when you have a man—have you ever had any men assigned to your boat for a temporary period because of a short-handedness in the crew?

A. Yes, sir.

Q. When someone is assigned to your boat, does the office tell you about this experience?

A. No, sir.

Q. Do they give you any information with respect to his qualifications or licenses or anything such as that?

A. No, sir." (page 395a)*

In the instant matter the "office" not only did not advise Kiernan of his co-worker's lack of experience in local waters but they also neglected to designate the captain for the voyage. The lower court in its finding of fact 21 states:

"... Red Star intended Kiernan would be captain."

While the court finds that such an intention existed there is no indication in the record that this intention was ever communicated to the men aboard the vessel. Counsel for Red Star states at page 13 in his answering brief:

"Phillip Keenan also testified Kiernan was designated Captain for the voyage, and was told that by Robert Fitch, the day dispatcher Kiernan relieved."

Keenan's testimony with respect to this point appears at page 708A. It reads as follows:

* References in parentheses refer to pages of the joint appendix.

"Q. You stated that John Kiernan was captain. How did you know that Kiernan was captain?

A. I was told by the day dispatcher, Mr. Robert Fitch, and I might have seen it from a crew list. Either from the crew list or been told by the day man."

The testimony as taken from the trial minutes is a more accurate representation of Keenan's understanding.

During Kiernan's direct testimony with respect to the position he occupied aboard the OCEAN PRINCE at the time of the casualty, the court propounded the following question:

"The Court: Do you understand that when you came over you were going to be captain or a mate or did you not understand anything either way.

The Witness: I understood it your honor that I was going over there as Mate." (page 355A)

In its opinion the court stated:

"... An unfortunate set of circumstances created unforeseen confusion relating to which of the watchstanders was to assume position of captain." (page 32A)

In finding No. 21 the court found:

"... Kiernan indicated doubt in his own mind that he was captain but he took certain steps which were appropriately done by the captain."

Kiernan when asked on redirect examination about the administrative acts which, while usually performed by the captain, were performed by him testified as follows:

"The Court: Yes, the log report for February 2nd is signed by you, I take it.

The Witness: Yes, sir.

The Court: When did you sign that report and send it in? Obviously it had to be after the 2nd. How long after the 2nd?

The Witness: It could be a day or so.

The Court: By the time you signed this, was it apparent to you that they were considering you to be the captain or did you sign it because of some other reason?

The Witness: I signed it because of some other reason.

The Court: What reason was that?

The Witness: Because nobody was taking care of the paper work, that's the reason I signed it.

The Court: Was Mr. Reimer still on board?

The Witness: I believe he was, sir, yes.

The Court: Was he still upset?

The Witness: Very upset, yes." (page 430A)

Kiernan also testified on cross-examination at pages 390A through 392A about his assignment to the tug OCEAN PRINCE as follows:

Q. Did you, from time to time, get transferred from Spentonbush to Red Star's employ to fill in on one of their tugs?

The Court: He testified yesterday that he only did it once, am I correct?

The Witness: Yes, sir.

Q. Have you done it at all since the 1974 incident?

A. No, sir.

Q. So that the incident of February—the transfer of February 1 through February 4 of 1974 was the only time that you worked for Red Star on one of their tugs?

A. Yes, sir.

Q. Do you recall who assigned you to the Red Star tug?

A. It was a night dispatcher from Red Star, I don't know his name.

Q. When he assigned you, did he discuss your experience with respect to tugboats?

A. No, sir.

Q. Did he tell you where your vessel would be operating?

A. No, sir.

Q. Did he tell you that Mr. Reimer would be coming aboard the vessel?

A. No, sir.

Q. When for the first time did you learn that Mr. Reimer would be working with you aboard the OCEAN PRINCE?

A. I didn't know he was going to come on until he was there.

Q. This would have been on the afternoon of February 2nd?

A. Yes, sir.

Q. When he came aboard, did you have any conversation with Mr. Reimer?

A. No, sir.

Q. Were you on watch when he came aboard, sir?

A. No, sir.

Q. Do you recall where you were at the time?

A. Bushey Shipyard in Brooklyn.

Q. Tied up alongside the pier?

A. Yes, sir.

Q. Did you say anything or did you see Mr. Reimer when he came aboard in the afternoon?

A. No, sir.

Q. When was the first time that you saw Mr. Reimer on board the tug?

A. When I came on watch in the evening.

Q. When was that, about 6 o'clock?

A. About 1800, yes, sir.

Q. Was this still at the Bushey Yard?

A. Yes, sir, I believe it was."

It is significant that Red Star did not produce anyone who could testify that Kiernan had been told that he was to be the captain for the voyage.

Appellant respectfully submits that the grounding of the barge NEW LONDON did not occur because of a single isolated incident. It was the result of an accumulation of factors, all of which originated in the "office" of Red Star. The assigning of Kiernan to the pilothouse was carried out by Red Star's night dispatcher. The failure to provide Kiernan with information about his co-worker originated in Red Star's dispatcher's office. The dispatcher assumed that the pilothouse personnel would discuss their respective experience. The "office" had no policy or had given no instructions with respect to disseminating information to the pilothouse personnel. The failure to designate a captain for the voyage, a fact which created confusion aboard the vessel originated with the "office".

In *The Complaint of Tug Helen B. Moran Inc.*, 560 F2d 527, this court stated at page 528 in footnote 3:

"If the defendant has created only a passive, static condition which made the damage possible, he is said not to be liable. But so far as the fact of causation is concerned, in the sense of necessary antecedents which have played an important part in producing the result, it is quite impossible to distinguish between active forces and passive situations, particularly since, as is invariably the case,

the latter are the result of other active forces which have gone before."

This same reasoning is applicable to the matter presently before this court. We submit that Red Star's actions cannot be isolated but on the contrary must be considered as causative when establishing fault for the grounding of the barge NEW LONDON. As such, they come within the privity and knowledge of Red Star and, therefore, are the basis for a reversal of the lower court's decision and a direction that a judgment be entered denying Red Star the right to limitation of liability.

POINT II

Reimer's lack of familiarity with the Hudson River contributed to the grounding.

The court below in finding No. 36 stated as follows:

"The grounding of the barge NEW LONDON resulted, in part, from Reimer's lack of knowledge of local landmarks and experience on the Hudson River."

It stated further in its opinion at page 31A:

"The operation of tug boats differs in several material respects from that of ocean going vessels. Because tugs are kept in operation so steadily and the watchstanders work such long hours (twelve a day) it is necessary to have two complete sets of crews, changing every two weeks as well as alternates for vacation periods. The crew ordinarily includes two watchstanders, a Captain and a Mate,

who alternate six hour watches. While on watch they usually not only command and navigate the tug but also serve as helmsman 'steering' the vessel. Necessarily this limits the amount of instrument navigation and plotting of position possible. For this reason such tugs are not usually equipped with gyro repeaters or peloruses for taking positions. *Navigation is done by sight of eye, piloting from known landmarks and aids to navigation. Consequently, intimate familiarity with the waters and hazards is far more important than in ocean navigation.*" (emphasis supplied)

Nonetheless, the court below later refused to find that this lack of knowledge created an unseaworthy condition which was within Red Star's privity and knowledge. The court cited *The Temple Bar*, 137 F2d 293 (4 Cir.) as being the more modern authority. Red Star's counsel, as would be expected, adopts the court's reasoning to sustain in its position that Reimer's lack of knowledge was not causative of the casualty. Appellant respectfully suggests that the court below at page 31A of its opinion accurately set forth the basis for distinguishing *The Temple Bar*, *supra* from the matter presently before this court. We suggest that the *Lady Pike*, 88 U.S. 1, 22 L.Ed. 499 is still sound law and applicable to the circumstances existing in this matter.

Appellant respectfully submits that the tug OCEAN PRINCE was not seaworthy because of the manner in which it had been manned. That this unseaworthiness was a contributing factor to the casualty of February 3, 1974 and that it was within the privity and knowledge of Red Star thus constituting an additional reason for denying limitation of liability and reversing the court below.

Red Star has failed in meeting its burden that the grounding was the result of fault not within its privity and knowledge and accordingly must be denied the right to limitation and liability.

Respectfully submitted,

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